

Before The Honorable William H. Orrick, Judge

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 VS.) NO. CR 15-582 WHO
)
 ADAM SHAFI,)
)
 Defendant.)
)

San Francisco, California
Thursday, April 13, 2017

TRANSCRIPT OF PROCEEDINGS

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Official Court Reporter

Thursday - April 13, 2017

1:50 p.m.

P R O C E E D I N G S

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THE COURT: Calling criminal matter 15-582, USA versus Adam Shafi.

Counsel, please come forward and state your appearance.

MR. SHIH: Good afternoon, Your Honor. Jeff Shih on behalf of the United States.

MS. AMRAM: And Galia Amram on behalf of Mr. Shafi, who is present in custody.

THE COURT: All right. Mr. Shafi, good afternoon.

THE DEFENDANT: Good afternoon.

THE COURT: All right. So we're here for the motion to dismiss the indictment.

Let me tell you how I size this up, and then let you argue. It seems to me that the analysis in *U.S. -v- Pugh*, that's subsection (h), is definitional and not an element is right. That's my inclination. I'm interested in the Government's response to the argument that was raised in the Reply Brief under *Russell*, that subsection (h) is definitional, limitations are essential and thus should be pleaded. Although I'm not convinced that this doesn't belong. This is a jury instruction that would be given during the trial, the definition.

But Ms. Amram, why don't you go ahead and take those on.

1 **MS. AMRAM:** Sure. So I think the two cases that are
2 most crucial to this are *Holder* itself, the Supreme Court's *HLP*
3 *versus Holder*, and *U.S. -v- Russell*. And in terms of *Holder*, I
4 think if you read the entire opinion, including the dissent,
5 what comes across is that the coordination requirement of
6 subsection (h) enacted was crucial to the Court's finding that
7 the statute was constitutional. And if there was a lot of back
8 and forth at the beginning of the opinion about how it was
9 maybe not -- you know, was it vague, was it not vague, and then
10 there was some -- you know, did subsection (h) apply to the
11 service requirement. So they were kind of going back and
12 forth. But then right before the end of the majority opinion,
13 the Supreme Court says -- and it's referring to the concerns
14 about the dissent -- that the dissent argues that there's no
15 natural stopping place for the proposition that aiding a
16 foreign terrorist organization's lawful activity promotes the
17 terrorist organization as a whole, and then it goes on to say
18 but Congress has just settled on such a natural stopping place.
19 And then it says the statute reaches only material support
20 coordinated with or in the direction of an FTO. Independent
21 advocacy that might be viewed as promoting the group's
22 legitimacy is not covered.

23 Then when you read the dissent, the dissent goes on and on
24 about how the majority is kind of hanging onto this
25 coordination requirement is not sufficient to the First

1 Amendment concerns. And so when you read that in context, both
2 the majority opinion and the dissent, and the majority opinions
3 kind of addressing the dissent's concerns, it becomes clear
4 that what everybody is hanging their hat on, whether they
5 agreed that it's enough or not, is the coordination
6 requirement.

7 And so I think then when you read that in the context of
8 *Russell*, which is that there are -- if there's an essential
9 fact, that that needs to be alleged in the indictment, I don't
10 see how you cannot allege this in the indictment. Because
11 under the Government's interpretation, which is subsection (h)
12 is a definition of a means of an element, then it doesn't need
13 to be in the indictment; it doesn't need to be proven beyond a
14 reasonable doubt. And my concern with that is that then you
15 can't have someone prosecuted quite clearly without any
16 evidence of coordination.

17 And the reason *Russell* goes -- talks a lot about the
18 Grand -- why we have a Grand Jury requirement and the
19 significance of that, and so that has to mean something. And
20 so the idea that Mr. Shafi can be prosecuted when the Grand
21 Jury never addressed whether or not there was an attempt to
22 provide himself under the direction or control of Al-Nusrah, I
23 think that's a big problem in light of *Holder's* opinion that
24 the statute is constitutional because of this requirement. So
25 you have a Grand Jury not passing on the crucial fact that the

1 Supreme Court found was necessary for the statute's
2 constitutionality.

3 So I think whether the Court defines it as a means, an
4 element or a definition, I think under *Russell* it has to be an
5 indictment.

6 **THE COURT:** But doesn't -- so when I was reading
7 *Russell*, it seemed to me that the issue there was
8 insufficiently apprizing the defendant of what he needed to be
9 prepared to meet.

10 **MS. AMRAM:** There --

11 **THE COURT:** It wasn't what the Grand Jury considered,
12 but it was really the other part, which I don't see as the
13 problem here, but maybe I'm missing something.

14 **MS. AMRAM:** Well, so that was the -- what *Russell* said
15 is that there were various problems with not having something
16 in the indictment. One was the idea that somebody of course
17 could be charged with something that's not actually a crime.
18 The other one was overreaching by the prosecutors; then there
19 was also the additional issue of the defendant not being fairly
20 apprized, and then there was double jeopardy.

21 And so the Supreme Court said in this thing we're not
22 concerned with double jeopardy, we're not concerned with the
23 others, we're concerned with the defendant being fairly
24 apprized. But that doesn't mean that *Russell's* entire analysis
25 does not apply to the other reasons why an indictment is

1 necessary.

2 And what's amazing in this case is that other district
3 courts have said *Russell* already applies to the material
4 support statute. So there are a number of cases in which
5 district courts have said that the means of committing material
6 support, meaning currency, expert assistance, service,
7 personnel, must be in the indictment, even though there's no
8 dispute that they are not elements. And they are actually in
9 the definition section of the statute.

10 So you have a number of -- and I don't think there's a
11 case that has found otherwise, but you have a number of
12 district courts that have said *Russell* already applies to the
13 material support statute, for something that is less
14 significant than subsection (h), for something that is clearly
15 a definition that's not put on its own that wasn't the basis
16 for the Supreme Court finding it constitutional.

17 So if *Russell* requires the actual means that are listed in
18 the definition section to be in the indictment, how can we say
19 that subsection (h) does not need to be in the indictment?

20 So that's the *Russell* argument.

21 I also think, just as a matter of statutory
22 interpretation, subsection (h) is element. There is a
23 definition section to the statute. It is not in the definition
24 section of the statute. I mean, Congress -- this is a statute
25 that was specifically amended in response to a holding that was

1 unconstitutional. So Congress was clearly considering that
2 when it decided how to amend the statute. And it did change
3 part of the definition. I believe it added "services" into the
4 definition section, but then it also added subsection (h), and
5 it added subsection (i). So if Congress wanted this to be a
6 definition, it would have been in the definition section.
7 Instead, they added it as its own section. They didn't say
8 "personnel is defined as." They said "no person shall be
9 prosecuted unless." And then they said, in subsection (i),
10 "this statute shall not be construed in any way as to abridge
11 the First Amendment."

12 In light of that, I don't see how it can be a definition.
13 I know that courts have, when they aren't addressing this
14 particular argument about what subsection (h) actually means,
15 refer to it as a definition just sort of as a way to describe
16 it, but that's not been in the context of what weight does
17 subsection (h) actually have. The only courts that have
18 addressed that, *Ahmed* and *Pugh*, one said affirmative defense
19 and one said definitional. But, again, *Pugh* did not address
20 *Russell* or the rule of lenity or the First Amendment concerns.

21 In the First Amendment concerns, a lot of *Holder* talked
22 about was the concerns with speech, which the Court may think
23 don't apply here. But there was a section on associational
24 rights, and that section said the reason we're upholding this
25 against an associational challenge is for the same reason we're

1 upholding it for the speech issues.

2 So everything that *Holder* said about the concern to speech
3 applied to association in terms of -- and the dissent also
4 talked about this in terms of why coordination did or did not,
5 meaning that it didn't violate somebody's associational rights.

6 So, you know, I also would point to the child porn, sexual
7 exploitation context which the Government actually raised,
8 which is a definition, but must be in the indictment, must be
9 proven beyond a reasonable doubt.

10 So I think if this is just the definition, then we get to
11 the point where now we're dealing with is the statute
12 unconstitutional as applied to Mr. Shafi? Because the whole
13 basis for *Holder*, which is this statute is valid because of the
14 coordination requirement, isn't actually -- doesn't have any
15 meat. He could still be charged without it.

16 I mean, let's be clear. It's my understanding I think
17 that there was absolutely no evidence of coordination presented
18 to the Grand Jury. If I'm wrong, the Government can correct
19 me. But I think that's a problem. I think after *Holder*,
20 that's a problem. There should be evidence of a coordination
21 or attempted coordination.

22 **THE COURT:** So you think that any time the Government
23 charges attempt, there has to be coordination?

24 **MS. AMRAM:** I think there has to be attempted
25 coordination. There has to be probable cause that the person

1 attempted to work under the direction or control of Al-Nusrah.
2 Does that mean they have to have actually worked under the
3 direction or control? Of course not, because that would be an
4 attempt. But there has to be an attempt to work under the
5 direction or control. I mean, that's like the plain
6 black-and-white words of the statute, is no person shall be
7 prosecuted unless they attempt to work under the direction or
8 control of the foreign terrorist organization. We may wish it
9 was written a different way -- well, not me personally -- other
10 people may wish it was written a different way, but that is the
11 way it was written, and it was written in direct response to a
12 finding that the previous version was unconstitutional. And
13 you know, the reason for that is because you have a right to
14 join organizations. You have a right to associate no matter
15 how criminal it is.

16 You know, and I think you put this in a context of like
17 the Ku Klux Klan, or something like that, which is, you know,
18 how much can we restrict, you know, someone's desire to go join
19 an organization that we all may find repugnant or to support
20 that organization. And the Supreme Court said that because of
21 this coordination requirement, this -- and this statute in this
22 context was upheld as constitutional. This was not like I
23 think a slam dunk. There was a substantial dissent, and the
24 Supreme Court -- the majority opinion said in itself that there
25 could be circumstances where even with the amendments from the

1 Protect Act, that the statute still might not even pass
2 constitutional muster; right? So they said it wouldn't
3 necessarily work if it was applied to a domestic organization.
4 It wouldn't work if it was independent advocacy. So even with
5 all the protections of subsection (h), there were still concern
6 that the statute was going to be unconstitutional on certain
7 contexts, but at least it was constitutional as it was applied
8 there.

9 So I don't think this is something where this Court should
10 then stretch to basically make subsection (h) irrelevant.

11 So that, you know --

12 **THE COURT:** Well, I don't think that I'm thinking that
13 it's irrelevant. The issue is does it have to be written into
14 the indictment, particularly in a situation not like *Russell*
15 where you're not -- you personally aren't disadvantaged from
16 having insufficient information in the indictment. But your
17 question is did the Grand Jury have the information to find
18 probable cause that all of the elements of the statute were
19 met.

20 **MS. AMRAM:** Right. Because I think it's irrelevant in
21 the sense that if there was no attempted coordination, then
22 Mr. Shafi did not commit a crime, the crime of material
23 support, which means he should not be sitting here in custody
24 for going on two years. And so that determination must be made
25 by a Grand Jury. You know, that's the Fifth Amendment.

1 So I think it's -- saying that it can all get worked out
2 in a jury trial because it will be given as a jury instruction
3 does not solve the problem with something that is this crucial,
4 and so for that reason it should be in the indictment. They
5 can either show that, and maybe they can or they can't show
6 that, but they should at least be obligated to present whatever
7 evidence they have in order to meet that requirement, and he
8 should not be held to answer if that's not there.

9 I do think there are notice requirements, though. I
10 mean -- and depending on what the Court's ruling, we may or may
11 not then have a motion for a bill of particulars. Because if
12 the Government is obligated to prove coordination -- I don't
13 have any evidence of coordination, I don't have any information
14 on what that would be -- then we do get into a notice problem.
15 But the first issue is does it need to be something that's in
16 the indictment at all.

17 **THE COURT:** I see. All right. Mr. Shih.

18 **MR. SHIH:** I'd like to take things in two phases.

19 The first thing is the last topic that the Court and
20 Ms. Amram were talking about, namely, what is required by the
21 statute. And the second thing, I'll address the Court's
22 questions as to the interpretation of the statute of what needs
23 to be pled, in addition to addressing the Court's questions as
24 to *Russell*.

25 So with regard to what's required under 2339, big B

1 subsection (h), I mean, I think that there is a couple of
2 different arguments that have been tossed out: One is whether
3 or not actual control, actual direction and control is
4 necessary. I think I heard today that in an attempt charge,
5 actual control and direction is not necessary. But there's
6 also a distinction between attempted coordination and attempted
7 provision of personnel to be coordinated. And the reason why I
8 want to be precise on that is because I think it does make a
9 difference not only -- not only as to the definition in which
10 the Court would charge a jury, but also the proof that the
11 Government would present to the jury.

12 Attempted coordination is different than providing one's
13 self in a method where you intend and take a substantial step
14 such that you expect to be coordinated. And so -- and I think
15 the statute is pretty clear that it's the latter, namely,
16 attempted provision of personnel, which would then be
17 coordinated with the foreign terrorist organization.

18 One other point that I wanted to make with that is there
19 was a statement in the Reply saying that this could potentially
20 be an end run around basically what was stated in *Holder versus*
21 *Humanitarian Law Project*. And there was one case that I was
22 able to find, the Court may find helpful, it was cited in our
23 opposition. It's *United States versus Williams*, 553 U.S. 285.
24 It's a Supreme Court case in 2008. Essentially what happened
25 in that case, it is a child pornography case, after *Ashcroft*

1 *versus The Free Speech Coalition*, the Supreme Court took up
2 that statute again after Congress had amended it. At issue
3 there was the pandering provision of the child pornography
4 statutes, and specifically whether or not it was constitutional
5 for the pandering provision to criminalize and offer or request
6 of child pornography if there was never any actual evidence of
7 actual child pornography. I think that it is analogous to this
8 case when we're talking about attempted provision of material
9 support, if we're talking about whether or not there needs to
10 be any proof of actual direction and control.

11 In a similar respect in *U.S. -v- Williams*, they address
12 the question of whether or not it was constitutional if there
13 was no evidence of actual child pornography to criminalize a
14 request or an offer. I think in that case the Court will find
15 that the Supreme Court stated this is constitutional. They
16 analyzed it under -- under the argument, which I think the
17 dissent made that this is an end run around *Ashcroft versus*
18 *Free Speech Coalition*.

19 So if the Court finds that helpful, I think that supports
20 our point that actual direction and control is not necessary,
21 and also attempted coordination is not necessary.

22 With regard to the second phase that I wanted to move
23 into, and that's the actual interpretation of the statute. You
24 know, I think we stated in our papers that the starting point
25 is *Mathis*. You look at the controlling law. You look at the

1 statutory text. And, you know, in this case I think both sides
2 acknowledge that there's no controlling law directly on point
3 interpreting this, but there's no other district court cases
4 that have held that the definition of "personnel" in subsection
5 (h) establishes an element of the material support charge.

6 Plus I think if you look at the statute, and you look at
7 what *Mathis* instructed to look at in the statute, there were
8 three different things: One was whether or not the statute
9 provided for different punishments, illustrative examples, or
10 specified what elements needed to be charged. We argued in our
11 papers that the material support statute does not establish
12 "personnel" as an element.

13 One, in preparation for this hearing, one example that I
14 thought was helpful, and my understanding of it, is comparing
15 the material support statute to 922(g). Namely, in 922(g) you
16 are criminalizing possession of a firearm by a list of
17 different types of prohibited persons. Those prohibited
18 persons in 922(g) are actually specified. There's a finite
19 set; right? That's in contrast to the material support statute
20 that defines material support, material support and resources.
21 If you look at the definition of material support, it says:
22 "Tangible or intangible property or services, including," and
23 then it lists out various items, including "personnel."

24 Now, the fact that that word "including" is there I think
25 implies that it is not a finite list. It is a list of

1 examples, much like what *Mathis* talked about with examples of a
2 dangerous weapon; right? You could have a knife, a gun, a bat,
3 et cetera. So I think that points to "personnel" not being an
4 element. Namely, it's an illustrative example as opposed to a
5 finite list of actual items.

6 In 922(g), you see the specification of different
7 punishments, depending on which prohibited person, which
8 subsection it applies to. In the material support statute you
9 don't have that.

10 And then you have the structure of the statute. In
11 922(g), the subsection of 922(g), that's the text that actually
12 makes it a crime to possess a firearm by a prohibited person,
13 where as in the material support statute you're talking about
14 one subsection of 2339 big B subsection (a). That's what makes
15 it a crime to provide material support. And you have these
16 other provisions, some are definitional, some are exceptions.
17 The personnel section is not labeled, it's either a definition
18 or an exception. But you have other subsections there. And I
19 think that -- the fact that it's not in the text that makes the
20 crime essentially is a good contrast between 922(g) and the
21 material support statute to show you how to -- show me how
22 *Mathis* applies, and why the material support statute does not
23 establish personnel as a element.

24 In addition to that, other things that we cited in our
25 brief about how the Supreme Court -- and I would also note that

1 the Ninth Circuit also talked about, in 2009 when they looked
2 at *Humanitarian Law Project* again, they talked about subsection
3 (h), referring it to -- narrowing the definition of what
4 personnel was.

5 Now, one of the arguments -- and I think this -- I think
6 this will lead me to the discussion of *Russell*, but one of the
7 arguments that was made was subsection (h) is important; right?
8 It has some constitutional import to it; right? There's no
9 question that it was litigated. I think we could have a debate
10 in reading *Humanitarian Law Project*, the Supreme Court case on
11 how important it was. But I don't think that really can be an
12 argument that subsection (h) was important. Congress thought
13 it important enough to enact, and I think the legislative
14 history shows that.

15 Now, even assuming its importance, however, one of the
16 things that I thought about is definitions generally are
17 material; right? When you're talking about *mens rea*,
18 knowingly, intentionally, willingly, those aren't immaterial
19 terms. You know, there's a lot of things in jury instructions
20 that are not elements that are critical to whether or not an
21 individual is guilty or not.

22 Similarly, when we talk about sexually explicit conduct in
23 the child pornography context, you know, whether or not -- I
24 think in our briefs we sort of debated is it -- you know, when
25 we're talking about elements versus means, I think the point

1 was made in the defendant's reply that sexually explicit
2 conduct is an element, and that comes from the statute.

3 If you look at the child pornography statutes, sexually
4 explicit conduct is located in the text of what makes
5 possession or transfer of child pornography a crime. But I
6 think it also provides a good example of why the definition of
7 "personnel" in subsection (h) and the material support statute
8 does not need to be pled in the indictment. Because if you
9 think about what sexually explicit conduct is -- right? -- that
10 is material. That is critical to the ban of child pornography
11 not violating the First Amendment; right? When we're talking
12 about *Ashcroft*, the decision of *Ashcroft versus Free Speech*
13 *Coalition*, it's not just that we have a visual depiction of a
14 child; right? It's we have a visual depiction of a child in
15 sexually explicit conduct.

16 Now, what is sexually explicit conduct? It is defined by
17 statute in 2256, and there are various different ways: Sexual
18 intercourse, bestiality, masturbation, sadistic or masochistic
19 abuse, lascivious exhibition of genitals. Those things are
20 critical for the child pornography statutes not violating the
21 First Amendment. But that definition, if you look at the
22 indictments that were cited by the defendant, that definition
23 of what sexually explicit conduct is not pled in the
24 indictment, because those things -- even though the Government
25 has the burden of proof -- right? -- the fact that something is

1 a definition doesn't mean that the Government doesn't have the
2 burden of proving; right?

3 But the question here under this motion is whether or not
4 it needs to be pled in the indictment. And I think the
5 sexually explicit conduct in the child pornography context
6 provides a good analogy to the arguments that we're having
7 here, even though the text of the statute, or perhaps
8 especially because of the text of the statute, establishes
9 sexually explicit conduct in those statutes as an element. So
10 even as an element you do not put the definition of an element
11 necessarily.

12 **THE COURT:** I see where you're going.

13 **MR. SHIH:** So getting to -- and the reason why I think
14 this dovetails to the discussion of *Russell*, I agree with the
15 Court. I think in reading -- in reading what happened, the
16 decision in *Russell*, you have the situation that both the Court
17 and counsel discussed wherein the decision it talks about the
18 crime was refusing to answer any question pertinent to the
19 question under inquiry by a subcommittee.

20 And one of the things that I caught from the decision was
21 it sounded like it was unknown to the defendant in that case
22 what the subject under the inquiry was. The theory changed
23 over time from the Government's perspective, which I think
24 presents a -- compounds the problem of fair notice to apprise
25 the defendant of what they need to defend against if the

1 Government is sort of given discretion to change what the
2 subject of inquiry is.

3 **THE COURT:** I think that's probably one of the things
4 Ms. Amram is concerned about.

5 **MR. SHIH:** Right.

6 **THE COURT:** And why a bill of particulars, if I go the
7 way that I go, wouldn't be a particularly suitable mechanism to
8 tie down the Government with respect to that.

9 **MR. SHIH:** Right. And one of the things -- well, one
10 of the things that's a little bit different, though, is that
11 with regard to the definition of "personnel," there is one
12 definition of "personnel," and that's given by statute; right?
13 So it's not a question of -- you know, I think there was that
14 antitrust decision where we're talking about domestic effects,
15 and we made the point in our briefs that that's a very unique
16 area of law.

17 But regardless of that, in that particular case, that
18 statute established two different possible ways that you could
19 prove domestic effects. So if you're talking about the things
20 that are critical to an indictment, the basic things, whether
21 or not the defendant has fair notice of what to defend, and to
22 be able to sort of define the scope of the double jeopardy bar,
23 that puts it in a different situation as the material support
24 statute with regard to personnel, and also, you know, sexually
25 explicit conduct as well. I mean, you basically have one

1 definition.

2 Now, I think, in terms of applicability of *Russell* to the
3 material support statute, I think, you know, there are cases
4 that already -- I mean, personnel is pled, you know. In this
5 case it wasn't that we just said that Mr. Shafi attempted to
6 provide material support. In that case, you know, I think the
7 argument would be, under *Russell*, there's got to be a little
8 bit more specificity as to what type of material support you're
9 talking about. And in this case we pled personnel.

10 But in terms of actually putting the definition into the
11 indictment, I don't think that's required.

12 One last point. There was one argument made with regard
13 to --

14 **THE COURT:** Well, I think the argument that Ms. Amram
15 is making is that if you're going on the basis of an attempt,
16 you have to show what -- you have to say something about what
17 that attempt was, how you're going to be able to prove that,
18 because otherwise all of us are personnel, all of us are
19 people. And so that, I think, is the argument.

20 The question is, is it required in the indictment or does
21 it get exposed in some other way.

22 **MR. SHIH:** Right. Right. And I think -- I mean, the
23 Government's theory is that Mr. Shafi attempted to fly to
24 Turkey to provide himself, on the date charged in the
25 indictment, to the foreign terrorist organization in the

1 indictment, namely, Al-Nusrah, and our argument would be that
2 that is sufficient for a bill of particulars.

3 I guess the last minor point that I'd like to make is
4 there was one argument on subsection (h) not being labeled as a
5 definition. And Congress does know how to make things certain,
6 but they don't always do that; right? And that doesn't make --
7 not being labeled a definition doesn't make something an
8 element; right? And it doesn't make it -- take it outside of
9 the definitional land.

10 And I think if I could just have a moment, Your Honor. I
11 thought of a couple of examples, you know, Bribery of Public
12 Officials, 18 U.S.C. section 201, definitions are given in 202.
13 It would be essential in that type of a crime to note what an
14 official act is and what a public official is, but they're not
15 defined in the definitional sections, they're defined in other
16 sections.

17 Similarly, Firearm Transfer By Sale of An Unlicensed
18 Dealer, there's a definitional section at 18 U.S.C. 921, but
19 what constitutes a license is defined someplace else, not
20 labeled a definition.

21 And similarly with Crime of Violence and Drug Trafficking
22 Crime for 924(c), those aren't labeled definitions either, but
23 they're not -- that doesn't -- you charge -- you charge them,
24 charge those terms as elements, but you don't put the whole
25 definition.

1 And I think we talked about What Is An Alien? It's the
2 same thing.

3 So with that, Your Honor, unless the Court would like to
4 address anything else, our argument would be that this Court
5 should -- should find that the material support statute
6 subsection (h) requires as specified -- what is specified in
7 subsection (h) and not actual direction and control and not
8 attempted coordination, and that's one; and two is that the
9 definition of "personnel" in subsection (h) is not an element
10 that needs to be pled in the indictment.

11 **THE COURT:** All right. Ms. Amram.

12 **MS. AMRAM:** Your Honor, if I could just briefly.

13 One thing I wanted to point out to the Court is when
14 Congress amended the material support statute to add subsection
15 (h), it also added definitions of training and expert advice or
16 assistance. So there was a number of amendments in that. It
17 added different means of committing the crime of material
18 support, and it added definitions to those means, and those
19 definitions were added in (b)(2) through (3). And this is all
20 laid out in the Ninth Circuit's opinion in *HLP versus Mukasey*,
21 552 F. 3d, 916 at 923. So Congress amended it and added
22 definitions and put those in the definition section, and that
23 it separately added subsection (h).

24 If -- and then last, well, two more -- one quick thing.
25 For *Pugh*, again, also, in addition to all these things that

1 *Pugh* did not address, the constitutional implications, the rule
2 of lenity, *Pugh* was not bound by the Ninth Circuit's opinion --
3 *Pugh*, if I'm pronouncing that wrong --which this Court is.

4 And finally, if this Court says that subsection (h) is not
5 an element, then we have a constitutional issue as to whether
6 or not the material support statute is constitutional as
7 applied to Mr. Shafi.

8 And then the next motion will be the material support
9 statute is both vague, and it violates its First Amendment
10 right because subsection (h) is not an element, and then we can
11 litigate that. And who knows what will happen with that.

12 But there is a doctrine of constitutional avoidance for a
13 reason. And so I think to avoid that particular issue, and to
14 avoid all the litigation about that, the Supreme Court was
15 pretty clear that the material support statute was
16 constitutional because of subsection (h). There was all this
17 back and forth from the defense -- with the dissent, because
18 the dissent said subsection (h) was not enough, the
19 coordination requirement was not enough to make the statute
20 constitutional, and then you have the majority opinion saying
21 it is enough. And so if the Court makes that not an element,
22 then we have this constitutional issue, and there's a doctrine
23 of constitutional avoidance.

24 And so I think if the Court takes into account the
25 principles of statutory interpretation, which is look at the

1 black and white letter of the statute, the way it's written:
2 "No person may be prosecuted unless," not "personnel is defined
3 as," if you look at the legislative history, if you look at the
4 fact that they didn't put it in the definition section, if you
5 look at the rule of lenity, if you look at the rule of
6 constitutional avoidance, every canon of statutory instruction,
7 every body of Supreme Court case law on how we interpret
8 statute says this should not be interpreted as a mere
9 definition.

10 And so for that we would ask the Court find it an element
11 or at least find under *Russell* that it must be in the
12 indictment.

13 **THE COURT:** All right. Thank you, both. The briefing
14 on this was excellent, and the argument was excellent. I'll
15 look again and try and get an order out as soon as I can.

16 Ladies and gentlemen, the courtroom is fairly full today,
17 as it often is when Mr. Shafi is here. I just want to tell you
18 that I appreciate your being here, and I'm glad you have come
19 to show your interest in what's happening here. So thank you
20 for being here.

21 How are things going otherwise?

22 **MS. AMRAM:** We are progressing through -- we've gotten
23 through almost all of the classified discovery, so there's --
24 we got some more recently, so we need to get through that, but
25 almost all of it has been gone through.

So what Mr. Shih and I talked about is that we need to set a status so that we could get your court's ruling, and then talk and figure out what the next step is going to be based on what that ruling is.

THE COURT: Okay.

MS. AMRAM: And so I figure if I could do April 27th or I could do May 4th, is there -- do you have a preference?

THE COURT: I think I may have a preference. I think May 4th will be better. It will give me a little more time to get the Order in.

MS. AMRAM: I could also do later. If the Court wants like May 11th, that's fine with me too.

THE COURT: Let's set it for May 4th. Does that work, Mr. Shih?

MR. SHIH: Yes, Your Honor. Thank you.

MS. AMRAM: Okay. So that -- yeah, and Mr. Shih proposed an extension of time.

MR. SHIH: Oh, yes, so it's May 4th.

THE COURT: May 4th at 1:30.

All right. Anything further from either?

MS. AMRAM: No, your Honor.

MR. SHIH: No, your Honor. Thank you.

THE COURT: I'm entering this Order, Mr. Shafi. I'll see you on May 4th.

(Proceedings adjourned at 2:27 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, July 21, 2017

A handwritten signature in cursive script, appearing to read 'Rhonda L. Aquilina', is written over a horizontal line.

Rhonda L. Aquilina, CSR No. 9956, RMR, CRR
Court Reporter